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IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-368

No. COA21-389

Filed 17 May 2022

Franklin County, No. 18 CRS 051837

STATE OF NORTH CAROLINA

v.

ALLEN MICHAEL BARSTOW

Appeal by Defendant from Judgment entered 1 April 2021 by Judge Cynthia K. Sturges in Franklin County Superior Court. Heard in the Court of Appeals 11 January 2022.

Attorney General Joshua H. Stein, by Assistant Attorney General William F. Maddrey, for the State.

W. Michael Spivey for Appellant-Defendant.

HAMPSON, Judge.

Factual and Procedural Background

¶ 1 Allen Michael Barstow (Defendant) appeals from a Judgment entered upon a jury verdict convicting him of one count of Driving While Impaired (DWI). Relevant to this appeal, the Record tends to reflect the following:

¶ 2 On 12 August 2018, Defendant was charged with DWI after being arrested by North Carolina State Trooper Anthony Lamancusa (Trooper Lamancusa) following a

traffic stop. Defendant retained Attorney Lawrence Tickle (Tickle) to represent him in Franklin County District Court. On 18 September 2018, Tickle filed a pretrial Motion to Suppress evidence obtained at the stop of Defendant's car. The district court denied this Motion. Following a 6 January 2020 bench trial, the district court convicted Defendant of DWI. Defendant appealed to Franklin County Superior Court for a trial de novo.

¶ 3 Prior to trial in superior court, Tickle filed a pretrial Motion to Suppress on 6 October 2020 to exclude evidence from the traffic stop. The trial court summarily denied the Motion because it contained no affidavit. Tickle subsequently filed a new Motion to Suppress with an accompanying affidavit, but once again, the trial court summarily denied the Motion on the basis the attached affidavit was insufficient. The trial court did, however, indicate it would leave the matter open for reconsideration during trial in case it heard evidence "that ma[de] [the trial court] think the stop . . . shouldn't come in."

¶ 4 Defendant's superior court trial began on 29 March 2021. The State began by questioning Lieutenant Keith Alston (Lieutenant Alston) of the Franklin County Sheriff's Office, who stopped Defendant's car on 12 August 2018 at 8:07 p.m. Prior to the stop, Lieutenant Alston received a 911 call about a domestic dispute taking place in a subdivision about a mile from his location. Lieutenant Alston responded to the call and was informed a Volkswagen Passat would be parked outside of the residence.

As Lieutenant Alston neared the scene, he saw a Volkswagen Passat leaving the subdivision. Lieutenant Alston activated his blue lights and "turned around to catch up with the vehicle." When the State began questioning Lieutenant Alston about the traffic stop, Tickle objected to the State's questioning on Fourth Amendment grounds and requested a *voir dire* of Lieutenant Alston, which the trial court allowed.

¶ 5 On *voir dire*, Tickle provided an email written by Lieutenant Alston after the stop, which mirrored Lieutenant Alston's testimony of the sequence of events so far. Tickle also questioned Lieutenant Alston about the 911 call. Tickle asked if what Lieutenant Alston referred to as "a domestic" was a crime and if, at the time Lieutenant Alston stopped Defendant, Lieutenant Alston was aware "of any criminal activity [Defendant] had committed[.]" Lieutenant Alston responded "no" to both questions and the State objected, arguing Tickle was trying to establish "there was no basis for the stop," a matter "addressed under a motion to suppress" which had already been denied. The trial court noted it would be reasonable for an officer called to the domestic dispute "to see the Passat and think that he is leaving the scene[ ] that he has been dispatched by 9-1-1 to attend to . . ." Further, the trial court ruled "if 9-1-1 thought it necessary from what they heard to call a deputy to the scene," the officer possessed reasonable suspicion of criminal activity. Thus, the trial court overruled Tickle's objection.

¶ 6 The State then resumed its direct examination and asked Lieutenant Alston about what he saw while talking with Defendant. Lieutenant Alston answered he saw an open cooler with a twelve-count case of Modelo beer inside and one of the bottles was missing. Lieutenant Alston testified he suspected Defendant was driving while impaired and "notified Franklin County 9-1-1 to dispatch a trooper to the scene[,]" because troopers were better trained to investigate DWI situations. Next, the State called Trooper Lamancusa who testified he arrived at 8:20 p.m. after receiving a call from highway patrol dispatch to report to the stop. During his testimony, Trooper Lamancusa described his interactions with Lieutenant Alston. Lieutenant Alston told Trooper Lamancusa he had smelled alcohol on Defendant's breath, heard slurred speech, and saw Defendant's red eyes, which Trooper Lamancusa corroborated. Trooper Lamancusa also saw Defendant was not wearing a shirt or shoes. Trooper Lamancusa asked Defendant if he had been drinking, and Defendant replied, "he had six drinks. . . at the pool." Trooper Lamancusa asked Defendant to get out of his car and administered roadside tests: including three breath tests at 8:45, 8:47, and 8:52 p.m. and a horizontal gaze nystagmus test. The results of the breath tests were 0.9, 0.10, and 0.11, respectively.

¶ 7 On cross-examination, Tickle employed a trial strategy in which he tried to show Defendant was not impaired while driving, but rather, Defendant's Blood Alcohol Content (BAC) "went up" after he was stopped. Tickle stipulated to the

admission of breath test results performed after the stop at the Franklin County Sheriff's Office at 9:49 and 9:52 p.m. that evening, both showing Defendant's BAC was 0.11. During his cross examination of Trooper Lamancusa, Tickle asked about the 8:45 p.m. roadside test, specifically the 0.9 result. The State objected to this question and argued the roadside result was inadmissible. In response, Tickle argued N.C. Gen. Stat. § 20-16.3(d), the applicable statute, only applied to the use of evidence by the State and the roadside BAC results were exculpatory evidence which "overrides the statutory scheme if it's part of the defense." The trial court concluded—based on the plain language of the statute—Tickle could not elicit testimony about numeric results from the roadside tests.

¶ 8 Subsequently, Tickle also requested "the charge conference to be that the .08 . . . has to be while driving[,]" and the trial court denied this request. After Trooper Lamancusa finished testifying, the State rested its case. Defendant elected not to present any evidence.

¶ 9 During his closing argument, Tickle told the jury:

> Now, the judge is going to give some instructions about .08 and alcohol being in your blood. And just the fact that alcohol is in your blood doesn't make it -- it doesn't mean that you're above the legal limit when you're driving. That test will show just the presence of alcohol in someone's blood on the roadside. The issue is the relevant time after driving.
>
> . . .

> I'm going to try to make it easy, that the evidence is clear, he was driving, right? The evidence was clear that at some point later he was impaired. But we're going to hang our hat and ask you to – to really discuss amongst yourselves is the when. When did it occur? When was the appreciable impairment? Was that while he was driving, after he driving, before he was driving? And we're going to ask you to decide it was after he was driving. That sure, had he not been stopped by Deputy Alston, had the 9-1-1 call not gone out, he would have been driving while impaired because time would have passed. But at the time he was stopped, he was not impaired. That's what we're going to hang our hat on.

¶ 10 The jury returned a guilty verdict. Defendant filed written Notice of Appeal to this Court on 7 April 2021.

Issues

¶ 11 The issues on appeal are whether: (I) the trial court erred in summarily denying Defendant's pretrial Motions to Suppress and subsequently overruling Defendant's objection made during trial to the introduction of evidence regarding the stop; and (II) Defendant was denied his Sixth Amendment right to Effective Assistance of Counsel.

Analysis

I. Motions to Suppress

A. Denial of First Pretrial Motion to Suppress

¶ 12 Defendant contends the trial court erred by summarily denying Defendant's first pretrial Motion to Suppress. N.C. Gen. Stat. § 15A-977 governs the procedure surrounding suppression motions in superior court and states in relevant part:

> (a) A motion to suppress evidence in superior court made before trial must be in writing and a copy of the motion must be served upon the State. The motion must state the grounds upon which it is made. The motion must be accompanied by an affidavit containing facts supporting the motion. The affidavit may be based upon personal knowledge, or upon information and belief, if the source of the information and the basis for the belief are stated. . . .
>
> . . .
>
> (c) The judge may summarily deny the motion to suppress evidence if:
> (1) The motion does not allege a legal basis for the motion; or
> (2) The affidavit does not as a matter of law support the ground alleged.

N.C. Gen. Stat. § 15A-977 (2021). In accordance with this statute, our Supreme Court has held defendants who fail "to comply with statutory requirements set forth in N.C.G.S. 15A-977 waive their rights to contest on appeal the admission of evidence on constitutional or statutory grounds." *State v. Holloway*, 311 N.C. 573, 578, 319 S.E.2d 261, 264 (1984) (concluding "the trial court could properly have denied the defendant's motion to suppress based on the defendant's procedural failings alone.").

¶ 13 Here, Defendant's first pretrial Motion to Suppress contained no affidavit and was, thus, not in compliance with N.C. Gen. Stat. § 15A-977(a). Therefore, the trial court did not err in summarily denying Defendant's first Motion to Suppress.

B. Denial of Second Pretrial Motion to Suppress

¶ 14 Defendant also contends the trial court erred in denying his second Motion to Suppress, arguing the affidavit accompanying the Motion was sufficient under N.C. Gen. Stat. § 15A-977. Motions to Suppress "must be accompanied by an affidavit *containing facts supporting the motion*." N.C. Gen. Stat. § 15A-977(a) (2021) (emphasis added). "If the motion fails to allege a legal or factual basis for suppressing the evidence, it may be summarily dismissed by the trial judge." *State v. Satterfield*, 300 N.C. 621, 625, 268 S.E.2d 510, 514 (1980).

¶ 15 For example, in *State v. Phillips*, the trial court summarily denied the defendant's motion to suppress even though it included an affidavit. 132 N.C. App. 765, 768, 513 S.E.2d 568, 571 (1999). The affidavit stated:

> 1) My name is Edward A. Fliorella, Jr. I am an attorney actively engaged in the practice of criminal law for the past ten years.
>
> 2) I have reviewed the discovery provided by the State with my client and, based upon those specific facts, and as alleged in this Motion to Suppress, it is the opinion of the undersigned that the relief requested should be granted.
>
> 3) That this affidavit is being filed pursuant to N.C.G.S. § 15A-977.

Id. at 769, 513 S.E.2d at 571. The defendant argued this affidavit was sufficient because it incorporated facts from the motion itself and that, taken together, the motion and affidavit complied with the statute. *Id.* This Court rejected defendant's argument explaining, defendant's affidavit "[did] not have a single fact in support of the motion to suppress" and [did] not state how defendant's constitutional rights were violated. . ." *Id.* Thus, we concluded the affidavit and motion did not comply with Section 15A-977(a) because "[the statute] explicitly and clearly states 'the motion must be accompanied by an affidavit *containing facts* supporting the motion.' " 132 N.C. App. at 769, 513 S.E.2d at 571 (citing N.C. Gen. Stat. § 15A-977) (emphasis added). Therefore, we held "the trial court did not err in summarily dismissing defendant's motion. . ." *Id.*

¶ 16 Here, the affidavit stated:

> 1. That I am an attorney duly licensed to practice law in the state of North Carolina;
> 2. That this motion to suppress the evidence in this case is made in good faith
> 3. That I have surveyed relevant case law and statutory law and that this motion is not controverted or disallowed according to my understanding of the law at issue in this motion.
> 4. That the facts stated in the Motion and exhibits attached thereto are based upon information and belief from my review of the evidence provided by the state in this case:
> 5. That the basis for the motion(s) to suppress are:
> a. The Fifth Amendment to the United States Constitution right against Self-Incrimination;
> b. The lack of reasonable suspicion to stop Defendant;

> c. Affiant incorporates the statements made in the Motion into this Affidavit;

Defendant's affidavit—like the one in *Phillips*—contains no facts which would support the motion and—as it relates to the stop of Defendant's vehicle—does not state how Defendant's rights were violated other than to generically allege a lack of reasonable suspicion. Thus, the renewed Motion to Suppress and accompanying affidavit remained insufficient to comply with the statutory requirements of § 15A-977(a). Therefore, the trial court did not err in denying Defendant's second Motion to Suppress. Moreover, and, in any event, even had there been any error, it was not prejudicial because the trial court allowed Defendant to raise the issue during trial.

C. Objection to Testimony During Trial

¶ 17 Indeed, Defendant next contends the trial court erred in overruling his objection to Lieutenant Alston's testimony on the basis there was not reasonable suspicion to stop Defendant.

¶ 18 The Fourth Amendment to the United States Constitution protects against unreasonable searches and seizures:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV. "[S]earches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment. . ." *Katz v. United States*, 389 U.S. 347, 357, 19 L. Ed. 2d 576, 585 (1967). "However, the United States Supreme Court has long held that the Fourth Amendment permits a police officer to conduct a brief investigatory stop of an individual based on reasonable suspicion that the individual is engaged in criminal activity." *State v. Jackson*, 368 N.C. 75, 77, 772 S.E.2d 847, 849 (2015) (citing *Terry v. Ohio*, 392 U.S. 1, 30-31, 20 L. Ed. 2d 889 (1968)).

¶ 19 "Reasonable suspicion is a 'less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence.' " *State v. Peele*, 196 N.C. App. 668, 670, 675 S.E.2d 682, 685 (2009) (quoting *State v. Styles*, 362 N.C. 412, 414, 665 S.E.2d 438, 439 (2008)). Officers need " 'some minimal level of objective justification' " as well as " 'specific and articulable facts . . . [and] rational inferences from those facts, as viewed through the eyes of a reasonable, cautious officer, guided by his experience and training.' " *State v. Maready*, 362 N.C. 614, 618, 669 S.E.2d 564, 567 (2008) (quoting *State v. Barnard*, 362 N.C. 244, 247, 658 S.E.2d 643, 645, *cert. denied*, 172 L. Ed. 2d 198 (2008)). The test for reasonable suspicion is the totality of the circumstances, as "a court must consider. . . the whole picture in determining whether a reasonable suspicion exists." *State v. Barnard*, 362 N.C. 244,

247, 658 S.E.2d 643, 645 (2008) (quoting *United States v. Cortez*, 448 U.S. 411, 417, 66 L. Ed. 2d 621, 629 (1981)) (internal quotes omitted).

¶ 20 In *State v. Campbell*, an officer responding to a break-in observed a cyclist within a quarter mile of the crime scene. 188 N.C. App. 701, 702, 656 S.E.2d 721, 722 (2008). Officers then saw the defendant, riding a similar bike, coming from a road close to the scene and "playing with something in his backpack." *Id.* Officers stopped defendant and found jewelry, drug paraphernalia, and tools consistent with those used in the break-in. *Id.* at 702-03, 656 S.E.2d at 723-24. The defendant argued being seen "in the vicinity of" the burgled address and "coming from the area of the burglary," was not enough to support reasonable suspicion. *Id.* at 707, 656 S.E.2d at 726. This Court concluded "proximity to a crime scene, the time of day, or the absence of other persons in and of themselves may be insufficient to establish reasonable suspicion, but taken together, such factors certainly may suffice." *Id.* Moreover, although the officers did not see the defendant leaving the exact address of the robbery, a quarter mile away from the address was sufficiently close to the crime scene to support reasonable suspicion in combination with the other factors. *Id.*

¶ 21 Likewise, in *State v. Allen*, a 911 caller complained of an alleged assault at a motel and described the suspect as fleeing "in a small dark car driven by a white female with blonde hair." 197 N.C. App. 208, 209, 676 S.E.2d 519, 520 (2009). Officers saw a "small, light-colored vehicle" leaving the motel, driven by a blond

female, the defendant. *Id.* The officer followed and saw her "driving hastily" over uneven pavement in a parking lot before stopping. *Id.* The officer asked her some questions about the assault, realized she had been drinking, and arrested her for driving while intoxicated. *Id.* The defendant argued the victim's tip was not enough to stop her. *Id.* at 210, 213, 676 S.E.2d at 521, 523. However, this Court concluded the stop was reasonable because even though defendant's car was the wrong color, officers had seen it leaving the scene of the crime, driven by a woman who matched the victim's description, and driven erratically "as if she was trying to avoid" the officer. *Id.* at 214, 676 S.E.2d at 523.

¶ 22 In this case, the trial court's Findings of Fact support its determination the officer had reasonable suspicion to initiate a traffic stop. Like in *Allen*, a 911 call prompted police presence at the scene. Indeed, while Lieutenant Alston acknowledged that not every domestic dispute constitutes a criminal offense, that this one prompted a 911 call—as the trial court found—would at least suggest the potential of a criminal incident requiring a law enforcement response. Moreover, as in *Allen*, the officers were also directed to look out for a specific type of car, a Volkswagen Passat, and individual based on a report from the victim. Additionally, Lieutenant Alston was only a mile away from the reported incident when he saw a Passat traveling from the subdivision. Thus, there was a relatively short proximity to the scene of the reported incident and a match with the vehicle reported at the

scene. *See Campbell*, 188 N.C. App. at 707, 656 S.E.2d at 726 (concluding vicinity is relative and could encompass up to two miles from the scene).

¶ 23 Therefore, on these facts, the trial court correctly determined these circumstances gave rise to reasonable suspicion to stop the Passat: 911 dispatched Lieutenant Alston to a subdivision to investigate a domestic dispute, he was on notice of a specific type of car connected to the domestic dispute, and he saw the specific car leaving the subdivision in which the alleged domestic dispute occurred. Thus, the trial court did not err in finding under the totality of the circumstances that Lieutenant Alston had reasonable suspicion to conduct the traffic stop of Defendant. Consequently, the trial court did not err in overruling Defendant's objection to the evidence arising from the traffic stop and we affirm the trial court's ruling.

II. Ineffective Assistance of Counsel

A. Per se IAC and *State v. Harbison*

¶ 24 Defendant's second contention is his Sixth Amendment rights were violated because Tickle provided him with Ineffective Assistance of Counsel (IAC). Specifically, Defendant contends Tickle committed a per se violation of effective assistance of counsel because Tickle admitted his guilt in court without his permission.

¶ 25 The Constitution of the United States guarantees: "[i]n all criminal prosecutions, the accused shall enjoy the right to. . . have the Assistance of Counsel

for his defense." U.S. Const. amend. VI. "This right is not intended to be an empty formality but is intended to guarantee effective assistance of counsel." *State v. Sneed*, 284 N.C. 606, 612, 201 S.E.2d 867, 871 (1974) (citing *Powell v. Alabama*, 287 U.S. 45, 77 L. Ed. 158). "To prevail on a claim of ineffective assistance of counsel, a defendant must first show that his counsel's performance was deficient and then that counsel's deficient performance prejudiced his defense." *State v. Allen,* 360 N.C. 297, 316, 626 S.E.2d 271, 286 (citations and quotation marks omitted), *cert. denied,* 549 U.S. 867, 166 L. Ed. 2d 116 (2006). However, "when counsel to the surprise of his client admits his client's guilt, the harm is so likely and so apparent that the issue of prejudice need not be addressed." *State v. Harbison*, 315 N.C. 175, 180, 337 S.E.2d 504, 507 (1985). "[A] criminal defendant suffers a per se violation of his constitutional right to effective assistance of counsel when his counsel concedes the defendant's guilt to the jury without his prior consent." *State v. McAllister*, 375 N.C. 455, 456, 847 S.E.2d 711, 712 (2020) (citing *Harbison*, 315 N.C. 175, 337 S.E.2d 504).

¶ 26 Defendant contends Tickle "admitted, either expressly or by clear implication," Defendant's "guilt of every element of driving while impaired[,]" thereby triggering a *Harbison* inquiry. Thus, we first must determine if defense counsel's statements were in fact admissions triggering *Harbison*. *State v. Maniego*, 163 N.C. App. 676, 683, 594 S.E.2d 242, 246 (2004) (citation omitted). We first note the facts in this case are distinguishable from the facts in *Harbison*. In *Harbison*, defense counsel expressly

told the jury to find the defendant guilty of manslaughter and not first-degree murder. 315 N.C. at 178, 337 S.E.2d at 506. Here, Tickle expressly argued Defendant was not impaired while driving and expressly told the jury to find Defendant not guilty of the offense of driving while impaired.

¶ 27 Moreover: "Admission by defense counsel of an element of a crime charged, while still maintaining the defendant's innocence, does not necessarily amount to a Harbison error." *State v. Wilson*, 236 N.C. App. 472, 476, 762 S.E.2d 894, 897 (2014) (citation omitted). For example, in *State v. Fisher*, the defendant was convicted of first-degree murder. 318 N.C. 512, 516, 350 S.E.2d. 334, 337 (1986). During closing remarks, defense counsel stated: "[s]econd[-]degree [murder] is the unlawful killing of a human being with no premeditation and no deliberation but with malice, illwill. You heard [the defendant] testify, there was malice there. . . ." *Id.* at 533, 350 S.E.2d at 346. On appeal, the North Carolina Supreme Court held: "Although counsel stated there was malice, he did not admit guilt, as he told the jury that they could find the defendant not guilty. . . . [Therefore,] this case does not fall with the *Harbison* line of cases[.]" *Id.*

¶ 28 Here, Tickle admitted Defendant was driving, and admitted at some point, after the time he had been stopped, Defendant became impaired. However, Tickle never admitted Defendant was impaired while driving, or any time afterwards relevant to driving. Indeed, Tickle expressly argued Defendant was not impaired

while driving and explained in his role as a defense attorney his job was to poke holes in the State's case, which he tried to do here by making the jury question how much time had passed between Defendant driving the car and the subsequent tests demonstrating impairment. As such, Tickle never expressly admitted Defendant's guilt to the charge against him, and therefore, did not commit a per se IAC violation.

B. *Strickland v. Washington* Analysis

¶ 29 In the alternative, Defendant contends Tickle's representation constituted IAC under *Strickland v. Washington*, asserting Tickle's trial strategy fell below an objective standard of reasonableness for defending a DWI charge.

¶ 30 To succeed on his IAC claim, Defendant "must show that counsel's representation fell below an objective standard of reasonableness" and "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 688, 694, 80 L. Ed. 2d 674, 693, 698 (1984); *see also State v. Braswell*, 312 N.C. 553, 562-63, 324 S.E.2d 241, 248 (1985) (adopting *Strickland* standard for IAC claims under N.C. Const. art. 1, §§ 19, 23). In addition, "[D]efendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy" inasmuch as "[t]here are countless ways to provide effective assistance in any given case." *Strickland*, 466 U.S. at 689, 80 L. Ed. 2d at 694-95 (citation and quotation marks omitted).

¶ 31 "In general, claims of ineffective assistance of counsel should be considered through motions for appropriate relief and not on direct appeal." *State v. Stroud*, 147 N.C. App. 549, 553, 557 S.E.2d 544, 547 (2001) (citations omitted). "IAC claims brought on direct review will be decided on the merits when the cold record reveals that no further investigation is required, i.e., claims that may be developed and argued without such ancillary procedures as the appointment of investigators or an evidentiary hearing." *State v. Fair*, 354 N.C. 131, 166, 557 S.E.2d 500, 524 (2001) (citations omitted). However, "should the reviewing court determine that IAC claims have been prematurely asserted on direct appeal, it shall dismiss those claims without prejudice to the defendant's right to reassert them during a subsequent MAR proceeding." *Id.* at 167, 557 S.E.2d at 525 (citation omitted); *see also State v. Allen*, 360 N.C. 297, 316, 626 S.E.2d 271, 286 (2006) ("[W]hen it appears to the appellate court further development of the facts would be required before application of the Strickland test, the proper course is for the Court to dismiss the defendant's [IAC claim] without prejudice." (citation omitted)). Indeed, "[a] motion for appropriate relief is preferable to direct appeal because in order to defend against ineffective assistance of counsel allegations, the State must rely on information provided by defendant to trial counsel, as well as defendant's thoughts, concerns, and demeanor." *State v. Stroud*, 147 N.C. App. 549, 554, 557 S.E.2d 544, 547 (2001).

¶ 32 Here, we are unable to decide Defendant's IAC claim based on the "cold record" on appeal. *Fair*, 354 N.C. at 166, 557 S.E.2d at 524 (citation omitted). Indeed, there remain key issues of fact as to whether Tickle's conduct was reasonable or not. For example, the Record does not reveal why Tickle elected to employ the strategy he did or whether Defendant assented to Tickle's trial strategy. We thus conclude, "further development of the facts would be required before application of the Strickland test[.]" *Allen*, 360 N.C. at 316, 626 S.E.2d at 286 (citation omitted). Therefore, we dismiss without prejudice Defendant's IAC claim so that Defendant may elect to raise it before the trial court in a motion for appropriate relief.

C. Attorney Conduct Surrounding Motions to Suppress

¶ 33 Finally, Defendant contends Tickle rendered ineffective assistance of counsel by failing to properly file and pursue his Motions to Suppress. This Court has held the failure to file motions to suppress does not necessarily constitute ineffective assistance of counsel "when the stop or search that led to the discovery of the evidence was lawful." *State v. Canty*, 224 N.C. App. 514, 517, 736 S.E.2d 532, 535 (2012); *See State v. Jones*, 221 N.C. App. 236, 241, 725 S.E.2d 910, 914 (2012) *and State v. Brown*, 213 N.C. App. 617, 620, 713 S.E.2d 246, 249 (2011). Here, we have already concluded the trial court did not err in allowing the State to introduce evidence of the traffic stop. Moreover, while Tickle's pre-trial motions to suppress were both statutorily deficient, any real prejudice resulting therefrom was effectively nullified by the trial

court's decision to permit Defendant to revisit the matter during trial once the evidence Defendant sought to have suppressed was elicited by the State. Therefore, with respect to any deficiencies in the Motions to Suppress, Defendant has failed to show "that counsel's representation fell below an objective standard of reasonableness" and "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694, 80 L. Ed. 2d at 698. Thus, Defendant has failed to show he received ineffective assistance of counsel from Tickle as it relates to the Motions to Suppress Tickle filed on Defendant's behalf. Consequently, we deny Defendant's request for a new trial on this basis.

Conclusion

¶ 34 Accordingly, we conclude there was no error in Defendant's trial and affirm the trial court's Judgment. We dismiss Defendant's IAC claim related to his trial counsel's trial strategy without prejudice to Defendant's right to file a motion for appropriate relief.

NO ERROR IN PART; DISMISSED WITHOUT PREJUDICE IN PART.

Judges ARROWOOD and CARPENTER concur.

Report per Rule 30(e).